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SALES CONTRACTS AND THE CIRCULAR ECONOMY

Katarzyna Kryla-Cudna*

ABSTRACT: The aim of this paper is to investigate the ways in which the law of sales can contribute to the circular economy. The paper focuses on the exercise of the remedies for non-conformity of the goods with the contract. In particular, the paper examines the remedy of repair and the remedy of replacement with a refurbished rather than a new good. A broader availability of these remedies may clearly support sustainability goals. At the same time, however, it may limit the protection of the contractual interest of the buyer. This paper offers a novel approach which allows for a broader applicability of repair and replacement with a refurbished good while at the same time ensuring an adequate protection of the buyer's performance interest. Furthermore, the paper investigates other instruments within sales law, beyond repair and refurbishment, which can support the circular economy. In this respect, the paper examines the role of the length of legal guarantee periods, the burden of proof of the non-conformity and the regulation of sales of second-hand goods.

1. INTRODUCTION

1. The concept of 'circular economy' refers to an economic system in which the value of products and materials is maintained for as long as possible. As such, the circular economy aims at improving the productivity of resources. The circular economy is in contrast to the linear economy which favours a 'take, make, dispose' model of production. The circular economy is more sustainable than the linear economy. It reduces the used resources as well as the created waste and consequently contributes to the reduction of environmental pollution.¹ The strengthening of the circular economy is on the agenda of both the EU Member States² and the European Union itself. The European Commission presented its plans in this respect in the 'Circular Economy Action Plans'.³ It will be argued in this paper that

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¹ See K. WEBSTER, *The circular economy. A wealth of flows*, Ellen MacArthur Foundation, 2nd edn. 2017; K. RAWORTH, *Doughnut economics*, Random House, London 2017, p. 220; M. GEISSDOERFER, P. SAVAGET, N.M.P. BOCKEN, E.J. HULTINK, 'The Circular Economy – a New Sustainability Paradigm?', (2017) 143 *Journal of Cleaner Production* 757.

² See e.g. the Dutch Government: 'A Circular Economy in the Netherlands by 2050. Government-wide Programme for a Circular Economy', available at: <<https://www.government.nl/documents/policy-notes/2016/09/14/a-circular-economy-in-the-netherlands-by-2050>> (accessed 30 May 2020).

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Closing the Loop – an EU Action Plan for the Circular Economy' COM(2015) 614 final, available at <https://ec.europa.eu/environment/circular-economy/index_en.htm> (accessed 30 May 2020) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A New Circular Economy Action Plan – For a Cleaner and More Competitive Europe' COM(2020) 98 final,

sales law has a role to play in the development of the circular economy.⁴ In particular, the rules on the exercise of remedies for non-conformity of goods with a sales contract can be designed in a way which promotes a longer use life of goods and extends their durability.

2. The paper is structured as follows. The first part of the paper will focus on the remedy of repair. A broader applicability of this remedy instead of the alternative remedy of replacement can contribute to sustainability goals. At the same time, however, limiting the availability of replacement may undermine the protection of the buyer's interest in performance. In this part of the paper I will investigate how to set a balance between these two interests, i.e. the need to support sustainable development and the need to shield the contractual interest of the buyer. The second part of the paper will examine the practice of providing refurbished goods as a replacement for non-conforming ones. Refurbishment can contribute to sustainability goals to a similar extent as repair. Some businesses have already adopted the policy of replacing non-conforming goods with refurbished ones. One major ground on which this policy has been questioned by the courts is its interplay with the need to protect the buyer's contractual interest. The third part of the paper investigates instruments within sales law, beyond repair and refurbishment, which can support the circular economy. In this respect, the paper examines the role of the length of legal guarantee periods, the burden of proof of the non-conformity and the regulation of sales of second-hand goods. The last part concludes.

2. THE ROLE OF REPAIR AS A REMEDY FOR NON-CONFORMITY

3. The goal of the circular economy is to prolong the lifespan of goods in order to reduce waste. Repair, as a remedy for non-conformity of goods with a contract, can serve this goal as it preserves the

available at <https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf> (accessed 1 September 2020).

⁴ The role which consumer contract law can play in the circular economy has so far been discussed in the following publications: V. MAK, E. LUJINOVIC, 'Towards a Circular Economy in EU Consumer Markets – Legal Possibilities and Legal Challenges and the Dutch Example', (2019) 8 *Journal of European Consumer and Market Law* 4, reprinted in: B. KEIRSBILCK, E. TERRYIN (eds), *Circular Economy and Consumer Protection*, Intersentia, Antwerpen 2019; E. TERRYIN, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law', (2019) 27 *European Review of Private Law* 851, reprinted in: B. KEIRSBILCK, E. TERRYIN (eds), *Circular Economy and Consumer Protection*, Intersentia, Antwerpen 2019; V. MAK, E. TERRYIN, 'Circular Economy and Consumer Protection. The Consumer as a Citizen and the Limits of Empowerment through Consumer Law', (2020) 43 *Journal of Consumer Policy* 227; H. W. MICKLITZ, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy', (2019) 8 *Journal of European Consumer and Market Law* 229; B. KEIRSBILCK, E. TERRYIN, A. MICHEL, I. ALOGNO, 'Sustainable Consumption and Consumer Protection Legislation', In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, (2020) available at <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA\(2020\)648769_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA(2020)648769_EN.pdf)> (accessed 11 September 2020). See also a series of national reports published in the *Journal of European Consumer and Market Law*: B. KEIRSBILCK, 'Sustainability, the Circular Economy and Consumer Law in Belgium', (2020) 9 *Journal of European Consumer and Market Law* 165; C. MELLER-HANNICH, E. KRAUSBECK, 'Sustainability, the Circular Economy and Consumer Law in Germany', (2020) 9 *Journal of European Consumer and Market Law* 168; E. MIŠČENIĆ, 'Sustainability, the Circular Economy and Consumer Law in Croatia', (2020) 9 *Journal of European Consumer and Market Law* 173; C. DALHAMMAR, 'Sustainability, the Circular Economy and Consumer Law in Sweden', (2020) 9 *Journal of European Consumer and Market Law* 125; P. WEINGERL, 'Sustainability, the Circular Economy and Consumer Law in Slovenia', (2020) 9 *Journal of European Consumer and Market Law* 129.

energy and materials used to manufacture the goods and enables the buyer to use the goods for a longer period rather than seeking new goods instead (either as a replacement from the seller, or following the exercise of the right to rescind the contract – from a third party). Hence, extending the role of repair in the remedial scheme and increasing the number of instances in which this remedy is elected by the buyer rather than the alternative remedies of replacement and rescission can contribute to the circular economy. The significance of repair as an instrument to extend the lifetime of goods was emphasized in the EU’s Action Plan for the Circular Economy from 2015.⁵ It was pointed out in this document that repair should be promoted by a broader availability of spare parts and repair information (for example, through online repair manuals) as well as by designing products in a way which makes repair easier. A new Circular Economy Action Plan adopted by the European Commission in 2020 stresses the need to consider new horizontal material rights for consumers as regards the availability of spare parts and access to repair and the need to implement a new ‘right to repair’, primarily in the area of electronics and ICT.⁶ The new right to repair shall include a right to update obsolete software which could enable consumers to use devices for a longer period of time rather than replace them.

4. The remedy of price reduction, in fact, may lead to similar results as the remedy of repair because it encourages the buyer to keep the non-conforming goods rather than exchanging them for new ones.

2.1. REPAIR IN CONSUMER SALES CONTRACTS

5. In the EU, the remedies for non-conformity of goods with a contract in the case of consumer sales have been regulated in the Consumer Sales Directive 1999/44.⁷ The Directive sets a minimum harmonisation standard, allowing the Member States to introduce solutions that protect the interests of the consumer to a larger extent. Article 3 of the Directive provides for a hierarchy of remedies placing repair and replacement at the top, above the price reduction and rescission. Hence, in the case of non-conformity the consumer can ask for repair or replacement in the first place.⁸ Only where repair or replacement are not possible within a reasonable time or without a significant inconvenience to the consumer, the consumer can claim price reduction or rescind the contract.⁹

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Closing the Loop – an EU Action Plan for the Circular Economy’, *supra* note 3, at p. 7. For a broader analysis of measures which could promote repair, including a ‘do-it-yourself’ or independent repair see TERRY, 2019, *passim*.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A New Circular Economy Action Plan – For a Cleaner and More Competitive Europe’, *supra* note 3, at p. 5.

⁷ Directive 1999/44/EG of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171 7 July 1999, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999L0044>> (accessed 30 May 2020) (hereinafter ‘Consumer Sales Directive 1999’).

⁸ Article 3(3) of the Consumer Sales Directive 1999.

⁹ Article 3(5) of the Consumer Sales Directive 1999. One should note that some Member States adopted a right to reject goods with a defect within a short period of time after the delivery of the goods (see section 19(3) of the UK Consumer Rights Act 2015; for an analysis of the short-term right to reject in the context of remedies regulated in the Consumer Sales Directive 1999 see P. GILKER, ‘The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?’, (2017) 37 *Legal Studies* 78, at 86–88). The Consumer Sales Directive 2019 states

6. Both, repair and replacement can give the buyer the performance that he contracted for. Thus, they resemble the right to specific performance.¹⁰ If the buyer requests a repair, the seller is obliged to bring goods already delivered to the buyer into conformity with the contract. The remedy of repair requires the seller to fix the non-conformity by curing or replacing defective components of the goods but it does not involve a replacement of the goods as a whole.¹¹ The remedy of replacement, on the other hand, refers to situations where the goods are replaced in their entirety. In the case of replacement, a delivery of defective goods is cured by the delivery of substitute goods which conform to the contract.¹² The remedy of repair may not give the buyer *exactly* what he contracted for. A repaired good may not be a perfect equivalent of a new one. The aim of the remedy is rather to put the buyer in a position *as close as possible* to the position in which he would have been had the contract been performed. In contrast, the remedy of replacement ensures that the buyer gets exactly what was agreed upon in the contract. Another reason why a buyer may prefer one remedy over the other is convenience. In some cases, for example when the goods have already been installed, it may be more suitable for the buyer to claim repair of a defective component rather than to deinstall the goods in their entirety and request a replacement. At the same time, however, repair may involve some costs for the buyer, such as travel costs or waiting time, which may be avoided by choosing a replacement.¹³

7. Although the Consumer Sales Directive 1999 favours repair and replacement over the right to a price reduction and the right to rescind the contract, it does not provide for a hierarchy between the right to claim a repair and the right to claim a replacement. In general, the choice between repair and replacement lies with the buyer.¹⁴ The Directive does not impose an obligation nor provides an incentive for the consumer to elect repair instead of replacement. This approach has been expressly confirmed in domestic laws of some of the EU Member States. Section 439 I BGB states, for example, that '[a]s supplementary performance, the buyer may, *at his option*, demand the removal of the defect or supply a thing free from defects' (emphasis added).¹⁵ A similar provision has been adopted in the Dutch civil code.¹⁶ Even if the consumer does elect repair, the seller can refuse to accept this request and offer replacement instead if repair would be 'disproportionate'. It has been explained in Article 3(3) of the Consumer Sales Directive 1999 that repair is considered to be disproportionate if 'it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into

in its recital 19 that Member States may retain a right to reject goods with a defect within a specific short period not exceeding 30 days.

¹⁰ For an analysis of differences between specific performance and repair and replacement see V. MAK, *Performance-Oriented Remedies in European Sale of Goods Law*, Hart Publishing, Oxford and Portland 2009, pp. 115–116, 120 ff. In a nutshell, specific performance is not just a remedy of the promisee but it arises directly from the contract and signifies the actual performance that the promisee is entitled to. The right to claim repair or replacement, on the other hand, arises only upon breach of the primary obligations arising from the contract.

¹¹ MAK, 2009, 117.

¹² MAK, 2009, 118.

¹³ See also J. MCCOLLOUGH, 'Factors Impacting the Demand for Repair Services of Household Products: The Disappearing Repair Trades and the Throwaway Society', (2009) 33 *International Journal of Consumer Studies* 619.

¹⁴ Art. 3(3) Consumer Sales Directive; M.C. BIANCA, 'Article 3: Rights of the consumer', in M.C. BIANCA & S. GRUNDMANN (eds), *EU Sales Directive – Commentary*, Intersentia, Antwerpen 2002, p. 168; D. STAUDENMAYER, 'The Directive on the Sale of Consumer Goods and Associated Guarantees – A Milestone in the European Consumer and Private Law', (2000) 8 *European Review of Private Law* 547, 554.

¹⁵ The original text provides as follows: 'Der Käufer kann als Nacherfüllung nach seiner Wahl die Beseitigung des Mangels oder die Lieferung einer mangelfreien Sache verlangen.'

¹⁶ Article 7:21(1) BW.

account: the value of the goods; the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer.’

The Consumer Sales Directive 1999 had been under revision since 2015 as a result of which a new directive on consumer sales was adopted on 20 May 2019.¹⁷ The new Directive has not introduced substantive changes concerning the position of repair in the remedial scheme. Recital 48 of the Directive states that ‘enabling consumers to require repair should encourage a sustainable consumption and could contribute to a greater durability of products.’¹⁸ However, the seller is still allowed to refuse to repair the goods under the same conditions as before.¹⁹

8. A hierarchy of remedies whereby repair would be preferred over a replacement would certainly lead to sustainable outcomes.²⁰ At the same time, however, a clear preference for repair might restrict the protection of the buyer’s performance interest which should be the main goal of contractual remedies. One major reason why the buyer should be given a choice between the remedy of repair and the remedy of replacement is that the buyer is in a better position than both the seller and the court to determine which remedy can adequately protect his performance interest. The buyer can better assess whether repaired goods will satisfy the purpose for which he entered into the contract or whether his aims could only be satisfied by a replacement with new goods.²¹ Given that the purpose of remedies for a breach of contract is to put the promisee in the position in which he would have been had the contract been performed, the buyer should be given a chance to seek a remedy that is suited to place him in that position. In many cases, the remedy of repair can serve this function. Even though a repaired good may not be exactly what the buyer bargained for, as long as it functions as indicated in the description in the contract and satisfies the conditions of quality and fitness for purpose, it is likely that the buyer’s performance interest will be adequately protected. Nevertheless, where the remedy of repair cannot ensure the protection of the buyer’s interest, for instance where repair cannot bring the goods to the condition which the buyer could reasonably expect, he should be given an opportunity to claim replacement or to rescind the contract and purchase new goods from a third party.

As mentioned above, the buyer’s freedom of choice is subject to safeguards for the seller. In particular, repair cannot be claimed if it would be disproportionate or impossible. Apart from that, however, the buyer’s choice is unrestricted. Even though this may not correspond to sustainability goals, it is submitted that giving the buyer a choice between repair and replacement is, in principle, justified in consumer contracts. Sustainability goals may play a supplementary role in contract law. Nonetheless, the main purpose of contractual liability is to shield the performance interest of the promisee. If this interest can only be protected by replacement, the buyer should not be forced to claim repair even if this would lead to more sustainable outcomes.²²

¹⁷ Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, OJ L 136 22 May 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG> (accessed 30 May 2020).

¹⁸ Durability has also been added as an objective criterion for the assessment of conformity (see recital 32 and article 7).

¹⁹ Article 13(2) of the Consumer Sales Directive 2019.

²⁰ A. MICHEL, ‘La Directive 1999/44/CE sur la garantie des biens de consommation: un remède efficace contre l’obsolescence programmée?’, (2016) 2 *Revue européenne de droit de la consommation* 207, 228.

²¹ See however R. ZIMMERMANN, *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford University Press, Oxford 2005, p. 99.

²² See, however, TERRY, 2019, p. 856.

9. It could be argued, however, that in cases in which both repair and replacement may ensure an adequate protection of the buyer's performance interest, the principle of good faith accepted in civil law jurisdictions may require the buyer to elect a more sustainable remedy.²³ It has been recognized that the principle of good faith may limit the exercise of a remedy for a breach of contract. In particular, in most jurisdictions a party is not allowed to terminate the contract where the breach is negligible.²⁴ This solution is often considered to result from the principle of good faith.²⁵ The principle of good faith may also limit the possibility to claim specific performance by the promisee.²⁶

The principle of good faith is considered to be an 'open norm'²⁷; hence its exact content cannot be defined *in abstracto* but requires concretisation based on the specific circumstances of the case.²⁸ In general, good faith is concerned with moral standards of conduct, including honesty, candour and loyalty. In the realm of contract law, it is usually explained as a duty of the parties to take each other's interests into account.²⁹ Furthermore, it is considered to be the way for moral values to enter the law of contract.³⁰ Moral values are generally understood as values pertaining to rules of right conduct. The notion "moral" is defined as 'concerned with or derived from the code of behaviour that is considered right or acceptable in a particular society'.³¹ It is arguable that the principles of proper conduct accepted in the society nowadays require an account to be taken of environmental and sustainability concerns. Hence, the need to support sustainability goals could have an impact on contractual relationships through the principle of good faith. Since the principle of good faith is considered to apply at all stages of the life of a contract, including the stage of the exercise of the remedies for a breach, it may justify a broader use of repair in cases of non-conformity as a means to implement the values accepted in the society. In particular, in cases in which it is clear that repair can adequately protect the buyer's interest in performance, the principle of good faith may require the buyer to accept such a remedy rather than avoiding the contract or claiming a replacement.

²³ For a broader analysis of the principle of good faith in contract law see R. ZIMMERMANN, S. WHITTAKER, M. BUSSANI (eds.), *Good Faith in European Contract Law*, Cambridge University Press, Cambridge 2000. See also CH. ECKL, *Treu und Glauben im spanischen Vertragsrecht*, Mohr Siebeck, Tübingen 2007; K. RIESENHUBER, *System und Prinzipien des Europäischen Vertragsrechts*, De Gruyter Recht, Berlin 2003, p. 398 ff; F.M. SANZ, in H. SCHULTE-NÖLKE, R. SCHULZE, *Europäisches Vertragsrecht im Gemeinschaftsrecht*, Bundesanzeiger, Köln, 2002, p. 127 ff; O. LANDO, 'Is Good Faith an Over-Archiving General Clause in the Principles of European Contract Law?', (2007) 15 *European Review of Private Law* 841.

²⁴ See e.g. Article 1224 of the French Civil Code (the breach must be 'sufficiently serious') and § 323(5) BGB (the breach must not be trivial).

²⁵ M. HESSELINK, 'The Concept of Good Faith', in A.S. HARTKAMP, E.H. HONDIUS, C.A. JOUSTRA, C.E. DU PERRON, M. VELDMAN (eds), *Towards a European Civil Code*, Kluwer Law International, The Hague, London, Boston 2004, 471 ff.

²⁶ HESSELINK, 2004, 471 ff.

²⁷ J. WIGHTMAN, 'Good Faith and Pluralism in the Law of Contract', in R. BROWNSWORD, N.J. HIRD, G. HOWELLS (eds), *Good Faith in Contract: Concept and Context*, Ashgate 1999, pp. 41–65; M. MEKKI, M. KLOEPFER-PELÈSE, *Good Faith and Fair Dealing in the DCFR*, (2008) 4 *European Review of Contract Law* 338, 342.

²⁸ See J. BASEDOW, 'The Renaissance of Uniform Law: European Contract Law and its Components', (1998) 18 *Legal Studies* 121, 136.

²⁹ HESSELINK, 2004, 471 ff; C. SCHUBERT, § 242, in W. KRÜGER (ed.) *Münchener Kommentar zum BGB. Band 2*, C.H. Beck, 8th edn. 2019, para. 46.

³⁰ H. HEINRICHS, § 242, in *Palandt Bürgerliches Gesetzbuch*, C.H. Beck, 79th edn., 2020, para. 3. See also C. SCHUBERT, § 242, 2019, paras. 10, 77.

³¹ See e.g. the definition of the term available at: <<https://www.lexico.com/en/definition/moral>> (accessed 30 May 2020).

2.2. REPAIR IN COMMERCIAL SALES CONTRACTS

10. A number of EU Member States have extended the regime applicable to consumer sales to cover also commercial sales contracts. For example, § 439 of the BGB or article 7:21 of the Dutch Civil Code are of a general character and apply to all sales contracts. Same as in the case of consumer sales, the seller is therefore allowed to reject the buyer's claim for repair if it would be disproportionate. Article 7:21(1) of the Dutch Civil Code states that repair can be claimed 'as long as the seller can reasonably give effect to it', whereas replacement can be claimed 'unless the lack of conformity is too minor to justify it'. Thus, the domestic regulations provide for a broad availability of replacement as a remedy for non-conformity in both consumer and commercial sales contracts.

11. Repair and replacement have also been recognised as available remedies under the Vienna Convention on Contracts for International Sale of Goods ('the CISG')³² which applies to international sales contracts concluded between commercial parties. The solutions adopted in the CISG deserve a particular attention. According to article 46(2) and (3) of the CISG, repair may be required of the seller 'unless this is unreasonable having regard to all the circumstances'. Delivery of substitute goods, on the other hand, may be claimed by the buyer 'only if the lack of conformity constitutes a fundamental breach of contract.' As explained in article 25 of the CISG, a fundamental breach occurs where the failure to perform results in such a detriment to the buyer as substantially to deprive him of what he is entitled to expect under the contract.³³ The result of the breach must have been foreseeable to the party

³² United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18.

³³ See also A. MULLIS, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases', in M. ANDENÆS, N. JAREBORG (eds.), *Anglo-Swedish Studies in Law*, Iustug Förlag, Uppsala 1998, p. 326; L. GRAFFI, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention', (2003) *Revue de droit des affaires internationales* 338; R. KOCH, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)', *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International 1999, 348, available at <<https://cisgw3.law.pace.edu/cisg/biblio/koch.html>> (accessed 30 May 2020); P. HUBER, Article 49, in: H.P. WESTERMANN (ed), *Münchener Kommentar zum BGB. Band 4*, C.H. Beck, München, 8th edn., 2019, para 28; G. GRUBER, Article 25, in: H.P. WESTERMANN (ed), *Münchener Kommentar zum BGB. Band 4*, C.H. Beck, München, 8th edn., 2019), para 24; J.O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, The Hague, 3rd edn, 1999, para 296; M. MÜLLER-CHEN, Article 49, in P. SCHLECHTRIEM, I. SCHWENZER, U.G. SCHROETER (eds), *Kommentar zum UN-Kaufrecht (CISG)*, C.H. Beck, München, 7th edn., 2019, paras 4–14; U. MAGNUS, 'Beyond the Digest: Part III (Articles 25–34, 45–52)', in: F. FERRARI, H. FLECHTNER, R.A. BRAND (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, Sellier, München; Sweet & Maxwell, London 2004, p. 319, 323; A.M. GARRO, 'Cases, analyses and unresolved issues in Articles 25–34, 45–52', in: F. FERRARI, H. FLECHTNER, R. A. BRAND (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, Sellier, München; Sweet & Maxwell, London 2004, p. 362, 366; T. PLATE, 'The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?', 6 *Vindobona Journal of International Commercial Law and Arbitration* (2002) 57, 80; J. LOOKOFSKY, *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Kluwer Law International, Alphen aan den Rijn, 5th edn, 2017, § 6.9; B. KELLER, 'Favor Contractus. Reading the CISG in Favor of the Contract', in C.B. ANDERSEN, U. G. SCHROETER (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmons & Hill Publishing, London 2008, p. 258. See also the case law, e.g.: (Germany) BGH, 24 September 2014, available at: <<http://cisgw3.law.pace.edu/cases/140924g1.html>> (accessed 30 May 2020); (Switzerland) BG, 18 May 2009, available at: <<http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1900>> (accessed 30 May 2020); (Germany) OLG Köln, 14 October 2002, available at: <<http://cisgw3.law.pace.edu/cases/021014g1.html>>

in breach or to a reasonable person in that party's position. It has been clarified in the literature that in order to constitute a fundamental breach the failure to perform 'has to be as intense as the purpose of the contract could not be fulfilled anymore.'³⁴ In other words, it must 'destroy the core of the reciprocal exchange'.³⁵ Understood this way, the test is very difficult to satisfy and the instances in which a breach is likely to qualify as 'fundamental' are few. As a result, under the CISG, the buyer can claim repair in any case of non-conformity as long as it is not unreasonable whereas replacement can only be required in very rare circumstances. Thus, unlike the Consumer Sales Directives 1999 and 2019 and the discussed domestic regulations, the CISG clearly prioritises repair over replacement. Only where a breach of contract is fundamental, the buyer has a right to choose between repair and replacement. In other cases, he can only claim repair or invoke other remedies, in particular price reduction or damages, but he cannot request a replacement with a new good.

12. Furthermore, as long as the breach is not fundamental, the buyer does not have a right to avoid the contract under the CISG. Article 49(1) CISG clearly states that avoidance is only available where the breach qualifies as fundamental. It has also been accepted in both the case law³⁶ and the literature³⁷ that the buyer is not allowed to reject the goods and claim damages in lieu of the entire performance without first avoiding the contract. The Austrian Supreme Court confirmed that in cases in which the buyer rejects the non-conforming goods, an avoidance is necessary for an action for damages to be successful. Only if the buyer decides to keep the non-conforming goods and claim damages for the non-conformity, an avoidance is not needed.³⁸ Hence, the remedies of replacement, avoidance, or damages in lieu of the entire performance can only be invoked by the buyer in the rare cases of fundamental breach. If the breach is not fundamental, the buyer can only invoke the remedies of repair, price reduction and (complementary) damages. These remedies will require the buyer to keep the non-conforming goods.³⁹ It is clear therefore that the solutions adopted in the CISG have a potential to contribute to the circular economy goals to a much broader extent than the solutions adopted in the Consumer Sales Directives 1999 and 2019 and in some domestic regulations, such as German or Dutch law. Under the CISG, in the vast majority of cases of a breach of contract the buyer will be required to keep the goods and either request the seller to repair them or have them repaired by a third party or, if possible, make use of the goods regardless of the non-conformity and claim a price reduction or damages. Only in exceptional cases, the buyer will be entitled to request the seller to deliver new goods

(accessed 30 May 2020); (Germany) OLG Koblenz, 31 January 1997, available at: <<https://cisgw3.law.pace.edu/cases/970131g1.html>> (accessed 30 May 2020); (Switzerland) Handelsgericht Kanton Aargau 5 November 2002, available at: <<http://cisgw3.law.pace.edu/cases/021105s1.html>> (accessed 30 May 2020).

³⁴ KELLER, 2008, 258; KOCH, 1999, 348.

³⁵ KELLER, 2008, 258.

³⁶ (Austria) OGH, 6 February 1996, available at: <<http://cisgw3.law.pace.edu/cases/960206a3.html>> (accessed 30 May 2020); (Austria) OGH, 14 January 2002, available at: <<http://cisgw3.law.pace.edu/cases/020114a3.html>> (accessed 30 May 2020).

³⁷ P. HUBER, 'CISG – The Structure of Remedies', (2007) 71 *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 13, 29.

³⁸ (Austria) OGH, 6 February 1996, available at: <<http://cisgw3.law.pace.edu/cases/960206a3.html>> (accessed 30 May 2020); (Austria) OGH, 14 January 2002, available at: <<http://cisgw3.law.pace.edu/cases/020114a3.html>> (accessed 30 May 2020).

³⁹ If the seller refuses to repair the goods, the buyer can have them repaired by a third party and claim damages for the cost of cure.

as replacement for non-conforming ones or to reject the goods and enter into a cover transaction with a third party.

13. The comparison between the rules on consumer sales and the CISG shows that placing performance-oriented remedies, i.e. repair and replacement, at the top of a hierarchy of remedies is not a proper answer to sustainability problems. Rather, sustainability goals can be achieved by strengthening the role of remedies which require the buyer to keep the non-conforming goods instead of allowing the buyer to request a replacement by the seller or to enter into a cover transaction with a third party. This purpose can be served not only by the remedy of repair but also by the remedy of price reduction. The remedies which can undermine this goal, on the other hand, are not only replacement but also avoidance (rescission) of a contract.

14. Nonetheless, it may be questionable whether the approach adopted in the CISG would be suitable in the case of consumer sales. The question that needs to be addressed is whether the interest of the buyer in the case of consumer sales requires the same means of protection as in the case of commercial sales. The CISG follows similar principles for establishing the conformity of goods with the contract as the Consumer Sales Directives 1999 and 2019.⁴⁰ It emphasizes the primary significance of contractual descriptions in determining the conformity of goods. If there are no relevant indications in the contract, the Convention provides for a default standard focusing on fitness for purpose for which goods of the same kind are ordinarily used. Three tests have been indicated in the case law to assess the conformity of goods with the contract under the CISG: the merchantable quality test, the average quality test, and the reasonable quality test.⁴¹ The merchantable quality test means that if the goods can be resold on a market without abatement of the price, the seller is not liable. The average quality test implies a ‘middle belt of quality’. The last test is the most flexible one and is based on the general principle of reasonableness. None of these tests emerges as a clear leading standard to assess the quality of goods under the Convention.⁴² However, what all of the tests have in common is that they do not require the goods to always be *perfect* or *flawless* unless such perfection is necessary for the goods to fulfil their ordinary purpose.⁴³ It has been recognised in the case law that minor defects are often insufficient to consider goods unfit for their ordinary purpose under the CISG. The case law confirms that minor flaws can normally be expected where machinery, vehicles or commercial software are purchased.⁴⁴ Furthermore, it was confirmed in one case that where goods are supplied in large quantities, minor defects in the range of five to eight per cent are reasonably expected.⁴⁵ Moreover, even where a defect has an impact on the use of the goods but this impact is negligible, such a defect is not considered to be sufficient to qualify as a breach of contract. Therefore, for example, the delivery

⁴⁰ For a comparison see: S. GRUNDMANN, ‘Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?’, (2003) 14 *European Business Law Review* 237, 240.

⁴¹ See e.g. (Germany) LG Coburg, 12 December 2006, available at: <<http://cisgw3.law.pace.edu/cases/061212g1.html>> (accessed 30 May 2020).

⁴² D. SAIDOV, *The Conformity of Goods and Documents: The Vienna Sales Convention*, Hart Publishing, Oxford and Portland 2015, p. 117.

⁴³ (Belgium) Commercial Court Hasselt, 28 June 2006, (*Drukkerij Moderna NV v. IVA Groep BV*), English summary available at: <<http://cisgw3.law.pace.edu/cases/060628b1.html>> (accessed 30 May 2020); ICC Arbitration Case No. 8247, June 1996, available at: <<http://cisgw3.law.pace.edu/cases/968247i1.html>> (accessed 30 May 2020).

⁴⁴ See SAIDOV, 2015, p. 132 ff.

⁴⁵ (Canada) Ontario Superior Court of Justice, 31 August 1999, available at: <<http://cisgw3.law.pace.edu/cases/990831c4.html>> (accessed 30 May 2020).

of art exhibition catalogues in which one line of the text was misplaced was held not to amount to a breach because the text's comprehensibility was not affected.⁴⁶ This does not mean that minor aesthetic features of the purchased goods are of no significance in all circumstances. The content of the contract may suggest that the parties intended the goods to represent a certain level of quality. For instance, in cases in which the contractual description refers to 'luxury' or 'premium' goods and the price of the goods reflects such a high standard then even minor flaws in the appearance of the goods may render them unfit for their purpose. In the absence of a relevant indication in the contract, however, the delivery of goods which are not absolutely flawless is often not seen as a violation of the buyer's contractual interest. Taking this into account, it is understandable that the remedies of repair and price reduction are considered to protect the interest of the buyer to a sufficient extent under the CISG. In the professional context the goods do not always have to be flawless. Rather, they must serve the commercial purpose for which they were purchased. Even where a repaired good is not an *exact* equivalent of what the buyer contracted for, it is likely to fully satisfy the buyer's contractual interest in most cases.

15. In the case of consumer sales, on the other hand, where goods are purchased for personal use, even minor defects normally amount to a breach of contract. This is because consumers usually do not purchase goods to solely enhance their economic position but also to obtain a personal or subjective benefit⁴⁷ which often can only be acquired if the goods fully correspond to the contractual description, thus, if they are flawless. Therefore, the remedy of repair or price reduction may not always provide for an adequate protection of the consumer's performance interest. In some cases, the consumer must be given an option to elect replacement or rescission of the contract if he believes that only in this way he can be put in the position in which he would have been had the contract been performed. Hence, the scope of the instances in which the remedies of replacement and rescission are available in the case of consumer sales should remain broader than in the case of commercial sales.

16. At the same time, however, there is no need for national lawmakers to maintain the same regime of protection in the case of both consumer and commercial sales. Even though the approach adopted in the CISG may not be suitable to apply in the case of consumer contracts it could be extended to commercial contracts concluded in a domestic context. Strengthening the role of the remedies which require the buyer to keep the goods also in the case of domestic commercial contracts could clearly contribute to sustainability goals while at the same time maintaining the level of protection which can be reasonably expected in the commercial setting.

⁴⁶ (Switzerland) Commercial Court Zürich, 21 September 1998, available at: <<http://cisgw3.law.pace.edu/cases/980921s1.html>> (accessed 30 May 2020).

⁴⁷ See D. HARRIS, A. OGUS, J. PHILLIPS, 'Contract Remedies and the Consumer Surplus', (1979) 95 *Law Quarterly Review* 58; S. MULLEN, 'Damages for Breach of Contract: Quantifying the Lost Consumer Surplus', (2015) *Oxford Journal of Legal Studies* 1.

2.3. REPAIR IN COMMERCIAL GUARANTEES

17. Apart from the legal guarantee, a buyer may be offered a commercial guarantee.⁴⁸ The way in which a commercial guarantee can contribute to the circular economy is by prioritising repair rather than both replacement and rescission as a remedy for non-conformity. The hierarchy of remedies introduced by the Consumer Sales Directive 1999, placing repair and replacement at the top, does not apply in the case of commercial guarantees. The law currently in force in the EU Member States leaves commercial guarantees largely unregulated and focuses mainly on information requirements imposed on the seller or producer offering such a guarantee.⁴⁹ In general, a commercial guarantee does not need to provide for repair at all but may offer a replacement of non-conforming goods or rescission as the sole remedy which can be invoked by the buyer. This may particularly be the case where, given the nature of a transaction (e.g. a transnational sale) or the product itself, a replacement or rescission is a more convenient or a cheaper option for the retailer than repair. The role of repair in commercial guarantees is further limited in cases in which the buyer is dissuaded from repairing the goods independently by a third party. Commercial guarantees very often state that the buyer cannot invoke his rights under the guarantee where a warranty sticker has been removed or third-party repair parts have been used.⁵⁰ Obviously, such statements do not exclude the buyer's rights under the *legal* guarantee. In the context of consumer sales, art. 7(1) of the Consumer Sales Directive 1999 explicitly indicates that any contractual terms which directly or indirectly waive or restrict the rights resulting from the Directive are not binding on the consumer. Moreover, art. 6(2) of the Directive requires the person issuing a commercial guarantee to be transparent about the availability of remedies under the applicable law. However, in practice many consumers do believe that their rights are limited to those indicated in a commercial guarantee and, therefore, refrain from claiming remedies resulting from the relevant national legislation.⁵¹

18. The justification for the issuer's right to limit the range of remedies available to the buyer under a commercial guarantee is to be found in the principle of freedom of contract. Given that a commercial guarantee imposes *additional* rights on the buyer (on top of the rights available under the applicable law), it is rather unlikely that restricting the range of remedies by excluding repair in a commercial guarantee could be considered as an unfair term under the Unfair Contract Terms Directive⁵² or as a misleading commercial practice under the Unfair Commercial Practices Directive⁵³.⁵⁴ Tonner and Malcolm suggested to impose a duty on producers to offer a commercial

⁴⁸ For a broad analysis of commercial guarantees see e.g.: CH. TWIGG-FLESNER, *Consumer Product Guarantees*, Ashgate 2003; A. WIEWIÓROWSKA-DOMAGALSKA, *Consumer Sales Guarantees in the European Union*, Verlag Dr Otto Schmidt 2012.

⁴⁹ Article 6 of the Consumer Sales Directive 1999. The Consumer Sales Directive 2019 extends the regulation of commercial guarantees albeit insignificantly. It introduces the liability for repair or replacement of a producer who offers a 'commercial guarantee of durability' (article 17 Consumer Sales Directive 2019).

⁵⁰ See also TERRY, 2019, p. 862.

⁵¹ WIEWIÓROWSKA-DOMAGALSKA, p. 5–6.

⁵² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 April 1993, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0013>> (accessed 30 May 2020).

⁵³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149 11 June 2005, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>> (accessed 30 May 2020).

⁵⁴ See also TERRY, 2019, p. 863.

guarantee in which the expected lifespan of the product would have to be clearly indicated as well as an information whether or not the producer guarantees the fitness of the product during this lifespan.⁵⁵ Such a solution would not contradict the principle of freedom of contract because the producer would still have a right to indicate that he does not guarantee that the product will function properly during the expected lifespan. At the same time, it would not have a *direct* impact on the significance of repair as a remedy for non-conformity. Nevertheless, an explicit statement by the producer that he does not guarantee the durability of the product for its expected lifespan would inevitably lead to negative commercial results. Therefore, imposing such an information requirement could potentially motivate the producers to invest more in durability of goods.

3. REPLACEMENT WITH REFURBISHED GOODS

19. Refurbishment is a special type of repair which may substantially contribute to the circular economy. It is a process in which used goods are returned to a manufacturer or vendor and then restored to a functional condition. The process involves rebuilding or repairing key components of goods so that they return into the ‘like-new’ state. The parts which cannot be brought back to the original quality are replaced. Hence, the final refurbished goods often include a combination of new and reused parts.⁵⁶ Although refurbishment has its origins in the B2B market⁵⁷, it is gaining interest for companies manufacturing goods designed for consumers. In particular, refurbishment has been applied in personal and home electronics (e.g., mobile phones, laptops, tablets), as well as in clothing and baby products (e.g., prams, travel cots and car seats).⁵⁸

Refurbishment can play a similar role as repair as far as sustainability goals are concerned. For instance, it may preserve the original energy and effort put in manufacturing of the goods and save the energy and effort that would have to be used to manufacture new goods.⁵⁹ If a repair of a non-conforming good is not feasible, the buyer could be offered a replacement by a refurbished good which may support the circular economy to a similar extent as repair.

20. Offering refurbished goods as a replacement for non-conforming ones seems adequate in the case of commercial sales. As discussed in the earlier part of this paper, in B2B transactions, the conformity of goods depends on whether they satisfy the commercial purpose for which they were purchased. If this purpose can be equally served by refurbished goods, then there is no reason to prevent the seller from offering such goods as a replacement in the case of non-conformity.

⁵⁵ K. TONNER, R. MALCOLM, ‘How and EU Lifespan Guarantee Model Could Be Implemented Across the EU’, p. 55, available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU\(2017\)583121_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583121/IPOL_STU(2017)583121_EN.pdf)> (accessed 30 May 2020).

⁵⁶ E. BRACQUENÉ, J. BRUSSELAERS, Y. DAMS, J. PEETERS, K. DE SCHEPPER, J. DUFLOU, W. DEWULF, ‘Repairability criteria for energy related products. Study in the BeNeLux context to evaluate the options to extend the product life time. Final report’, 2018, available at: <http://www.benelux.int/files/7915/2896/0920/FINAL_Report_Benelux.pdf> (accessed 30 May 2020), p. 18.

⁵⁷ E. VAN WEELDEN, R. MUGGE, C. BAKKER, ‘Paving the Way Towards Circular Consumption: Exploring Consumer Acceptance of Refurbished Mobile Phones in the Dutch market’, (2016) 113 Journal of Cleaner Production 743, 744.

⁵⁸ E. VAN WEELDEN, R. MUGGE, C. BAKKER, 2016, at 744.

⁵⁹ MAK, LUJINOVIC, 2019, p. 8.

21. As far as consumer sales contracts are concerned, the issue has led to several court cases in Europe.⁶⁰ The cases concerned the practice applied by Apple which has been offering replacement with refurbished goods in the case of non-conformity. According to information provided by Apple, all of their refurbished devices come with a new battery and new outer shell; include full functional testing, genuine Apple part replacements (if necessary) and a thorough cleaning; have the original operating system or a more recent version; and are repackaged in a brand-new box with all accessories and cables.⁶¹ Hence, refurbished devices offered by Apple arguably may constitute an equivalent of new devices. Nevertheless, so far, the courts have unanimously refused to consider them as such.

In a Danish case⁶², the customer's iPhone broke down after a year from the purchase and was returned to the manufacturer for repair. After a repair turned out to be unfeasible, the buyer was given a replacement phone. Subsequently, the buyer found out that the replacement device included refurbished parts about which he was not informed by Apple. Apple rejected the buyer's request to provide a new phone or to repair the original one. The Danish Consumer Complaints Board asserted that the buyer did have a right to a new replacement device rather than a refurbished one or to a full refund of the purchase price. The decision was made on the ground that the economic value of a phone containing refurbished parts is lower than the value of an entirely new phone even though both a new and a refurbished device may have the same appearance, functionality and life expectancy. Following a claim filed by Apple, the district court in Glostrup ruled in favour of the buyer without taking the environmental benefits of refurbishment into account.

The Amsterdam district court ruled on two analogous cases in 2016 and 2017⁶³. In both cases the non-conformity of a product (an iPhone and an iPad respectively) was cured by Apple by providing refurbished devices as a replacement which the claimants refused to accept. Both cases were decided in favour of the consumer. The decisions were justified by reference to the judgment in *Quelle* in which the European Court of Justice held that 'based on Article 3(1) of the Consumer Sales Directive, in case

⁶⁰ In the US, a class action has been started in 2017 concerning the practice of replacing non-conforming goods with refurbished ones which was applied by Apple – see *Maldonado, et al, v. Apple, Inc.*, Case No. 3:16-cv-04067-WHO. A nearly identical claim was brought in the case of *English v. Apple Inc.*, et al, Case No. 3:14-cv-01619-WHO. In *Maldonado, et al, v. Apple, Inc.*, according to the terms of the commercial guarantee in question, Apple was obliged to repair defects at no charge 'using new parts or parts that are equivalent to new in performance and reliability' or provide a replacement product that is 'new or equivalent to new in performance and reliability.' The terms of guarantee further stated that 'all replacement products provided under this Plan will at a minimum be functionally equivalent to the original product.' Each of the two claimants who started the class action reported malfunctioning of a product purchased from Apple and was offered several replacement devices which did not work properly. After having the replacement devices inspected by a third party, the claimants found out that the devices were not new but refurbished. Eventually, one of the claimants was given a well-functioning (although still refurbished) product. The other claimant refused to examine the functionality of the last provided replacement product due to the disappointment caused by the previous, unsuccessful attempts by Apple to make good the non-conformity. The claimants have argued that Apple violated the terms of the guarantee because refurbished replacement devices can never be 'equivalent to new in performance and reliability'. This class action is still ongoing.

⁶¹ <<https://www.apple.com/uk/shop/refurbished/iphone>> (accessed 30 May 2020).

⁶² The case is cited by D. WATSON, A.CH. GYLLING, N. TOJO, H. THRONE-HOLST, B. BAUER, L. MILIOS in 'Circular Business Models in the Mobile Phone Industry', Nordic Council of Ministers, Copenhagen, 2017, p. 58, available at: <<https://norden.diva-portal.org/smash/get/diva2:1153357/FULLTEXT02.pdf>> (accessed 30 May 2020).

⁶³ District Court Amsterdam, 8 July 2016, ECLI:NL:RBAMS:2016:4197 (iPhone); District Court Amsterdam, 18 April 2017, ECLI:NL:RBAMS:2017:2519 (iPad). The cases have been analysed by MAK and LUJINOVIC, 2019, pp. 8–9.

of a non-conformity of a product, a consumer does not have to pay compensation for the use of a defective good until replacement with a new good.⁶⁴ Based on that, the Amsterdam district court asserted that the seller must bear all the consequences of his failure to deliver goods that are in conformity with the contract.

22. The cases shed light on the way in which refurbished goods are perceived by consumers. They clearly suggest that consumers tend to see refurbished goods as being of a higher risk and lower quality than new ones.⁶⁵ Both the Danish and the Dutch decisions suggest the main reason for refusing a replacement with a refurbished good by the courts is the need to ensure that the buyer's contractual interest is adequately protected and that the buyer gets what he bargained for. It is submitted that offering a refurbished device as a replacement for non-conforming one can satisfy the buyer's interest in performance as long as the refurbished good functions as well as the good specified in the contract and measures up to the same quality and fitness for purpose. Hence, the legislative actions in this area should focus primarily on securing the quality of refurbished devices.

One way to reduce the lack of trust in the quality of refurbished goods is by unifying rules which the production of refurbished goods should comply with.⁶⁶ The quality of refurbished goods available on the market is varied due to the lack of clear standards which should be followed by traders in the process of refurbishment. Regulating the market for refurbished goods might increase their quality as well as strengthen the buyer's confidence in such products.⁶⁷

The buyers' confidence could be further increased by obliging the retailers to offer a new guarantee period for refurbished substitute goods.⁶⁸ The new guarantee period could be of the same length as in the case of new goods. A new guarantee period after repair or replacement has already been adopted in some jurisdictions, thus, it would not be an entirely new solution.⁶⁹

In the cited Danish case the Consumer Complaints Board stressed that the value of refurbished devices is lower than the new ones. In fact, purchased goods normally lose a lot of value by the mere fact that they are sold and used by the buyer. Therefore, a refurbished good will normally be of the same or even higher value than the good that it is to replace taking into account the degree of wear and tear of the latter. Nevertheless, in cases in which the value of a refurbished replacement device would indeed be lower, one could consider allowing the buyer to claim the difference in value from the seller. Such a claim, analogous to a claim for a price reduction, could ensure that the buyer's interest in

⁶⁴ Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-2685, ECLI:EU:C:2008:231, para 41. A similar outcome could be reached by a reference to the ECJ judgment in *Messner* (C-489/07) in which the Court confirmed, in the case of distance sales contracts, that a consumer should not bear any costs of a replacement of a product and should not be liable to the seller for the use of the goods. See also a recent judgment of the CJEU from 23 May 2019 in *Füllä*, C-52/18.

⁶⁵ It was confirmed in a study conducted by Test-Achats that refurbished phones may not be flawless – see <<https://www.test-aankoop.be/hightech/gsms-en-smartphones/nieuws/een-op-twee-refurbished-iphones-deugt-niet>> (accessed 30 May 2020). See also: E. VAN WEELDEN, R. MUGGE, C. BAKKER, 'Paving the Way Towards Circular Consumption: Exploring Consumer Acceptance of Refurbished Mobile Phones in the Dutch Market', (2016) 113 *Journal of Cleaner Production* 743.

⁶⁶ MAK, LUJINOVIC, 2019, p. 9.

⁶⁷ MAK, LUJINOVIC, 2019, p. 9.

⁶⁸ See also TERRY, 2019, p. 861; V. MAK, E. TERRY, 2020, 236–237.

⁶⁹ Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, pp. 14–16, available at: <http://publications.europa.eu/resource/ellar/4d120ad5-deee-11e7-9749-01aa75ed71a1.0001.01/DOC_1> (accessed 30 May 2020).

performance is adequately protected. At the same time, it could encourage a broader use of refurbishment and, consequently, promote sustainability goals.

4. MEANS TO ENHANCE THE SUSTAINABILITY GOALS BEYOND REPAIR AND REFURBISHMENT

4.1. THE TIME FOR ESTABLISHING CONFORMITY WITH THE CONTRACT

23. A major instrument to motivate the businesses to invest more in the quality of their products and to extend their lifespan is setting longer periods during which the buyer can invoke remedies for non-conformity. Apart from prolonging the usability of the goods by the buyer, longer periods of legal guarantee can tackle the problem of planned obsolescence. Planned obsolescence is a policy of designing products in such a way that their useful life is artificially limited. This practice is used by businesses to shorten ‘the replacement cycle’ of products in order to increase sales volume.⁷⁰

24. Article 39(1) of the CISG requires the buyer to notify the seller of a lack of conformity within a reasonable time after discovering it but no later than within two years from the date on which the goods were handed over to the buyer. After that period, the buyer loses the right to rely on the lack of conformity. The Consumer Sales Directive 1999 has introduced the minimum period of two years from the delivery as the time during which the remedies for non-conformity can be invoked, allowing the Member States to introduce longer periods.⁷¹ Longer guarantee periods have been adopted in some EU Member States.⁷² Furthermore, in some countries, such as the Netherlands and Finland⁷³, a strict maximum period for claiming remedies has not been introduced. Instead, these countries adopted a rule according to which the remedies can be invoked by the buyer during the normal lifespan of a given good. The rationale for such a solution is that consumers normally expect the purchased goods to function properly over their regular lifespan. Therefore, the law should ensure a protection of the buyer’s interest during such a period of time.⁷⁴

The Consumer Sales Directive 2019 has not introduced any changes as far as the length of time for invoking remedies for non-conformity is concerned. Same as the Consumer Sales Directive 1999, the new Directive sets the period of two years for the pursuit of consumer remedies.⁷⁵ It also provides that Member States may maintain or introduce longer time limits than indicated in the Directive.⁷⁶

⁷⁰ For a broader analysis see e.g. E. MAITRE-EKERN, C. DALHAMMER, ‘Regulating Planned Obsolescence: A Review of Legal Approaches to Increase Product Durability and Reparability in Europe’, (2016) 25 *Review of European, Comparative & International Environmental Law* 378.

⁷¹ Article 5(1) of the Consumer Sales Directive 1999.

⁷² See Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, pp. 14–16, available at: <http://publications.europa.eu/resource/cellar/4d120ad5-deee-11e7-9749-01aa75ed71a1.0001.01/DOC_1> (accessed 30 May 2020), p. 13.

⁷³ See Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, pp. 14–16, available at: <http://publications.europa.eu/resource/cellar/4d120ad5-deee-11e7-9749-01aa75ed71a1.0001.01/DOC_1> (accessed 30 May 2020), p. 13.

⁷⁴ MAK, LUJINOVIC, 2019, p. 7.

⁷⁵ Article 10(1) of the Consumer Sales Directive 2019.

⁷⁶ Article 10(3) of the Consumer Sales Directive 2019.

25. It can be questioned whether the limitation of the period of legal guarantee to two years is justified. According to a study conducted on behalf of the European Commission in 2017 on costs and benefits of extending certain rights under the Consumer Sales Directive⁷⁷, a period of three or five years would be more beneficial to consumers while at the same time contributing to the reduction in waste and addressing the problem of planned obsolescence. It was pointed out in the study that longer guarantee periods could potentially amount to higher costs for businesses. However, business interviews conducted as a part of the research suggested that most respondents did not believe that an extension of the guarantee period to three or five years would result in major costs. A Eurobarometer survey⁷⁸ indicated that 66% of European consumers would be willing to pay more for a product if the guarantee period was extended to five years.

26. The limitation of the legal guarantee period in the Consumer Sales Directives 1999 and 2019 to two years could be compensated by a broader use of commercial guarantees giving the consumer a longer time period to claim remedies for non-conformity. Extending the period during which the buyer can invoke remedies beyond the legal guarantee period may be seen as a marketing tool. It may promote goods by suggesting to the potential buyers that the expected lifespan of the goods is longer and signalling that the quality of the goods is high.⁷⁹

4.2. THE BURDEN OF PROOF

27. Sustainability goals cannot only be achieved by introducing a longer period for legal guarantee but also by adequately regulating the burden of proof. Under the Consumer Sales Directive 1999 the seller is liable for a lack of conformity which exists at the time of delivery of the goods.⁸⁰ Within the first six months from the delivery, it is the seller who must prove that the non-conformity did not exist at the time of delivery.⁸¹ This period of time has been extended to one year in the Consumer Sales Directive 2019.⁸² At the same time, Member States may maintain or introduce a period of two years from the time when the goods were delivered.⁸³ Apart from being beneficial to the buyer, the extension of the time during which the burden of proof is reversed can motivate the manufacturers to invest more in the better quality and durability of their products and, thus, support the circular economy by making the products usable for a longer time.

⁷⁷ Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, pp. 14–16, available at: <http://publications.europa.eu/resource/cellar/4d120ad5-deee-11e7-9749-01aa75ed71a1.0001.01/DOC_1> (accessed 30 May 2020), p. 61.

⁷⁸ Flash Eurobarometer 367. Attitudes of Europeans towards building the single market for green products. Report, 2013, p. 108, available at: <https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_367_en.pdf> (accessed 30 May 2020).

⁷⁹ TERRY, 2019, pp. 861–862.

⁸⁰ Article 3(1) of the Consumer Sales Directive 1999.

⁸¹ Article 5(3) of the Consumer Sales Directive 1999.

⁸² Article 11(1) of the Consumer Sales Directive 2019.

⁸³ Article 11(2) of the Consumer Sales Directive 2019.

4.3. SALES OF SECOND-HAND GOODS

28. Another way in which contract law can contribute to the circular economy is by increasing the confidence of potential buyers in the market for the second-hand goods. The aim of the circular economy is to retain the goods within the system for as long as possible. Therefore, the circular economy is a more efficient strategy than recycling. Recycling is the process in which waste materials are converted into new objects and new materials.⁸⁴ Recycled materials are typically of a lower value than the original materials or the original product as a whole. Furthermore, there usually is a non-recyclable waste left in the process of recycling which exits the system and its value is lost.⁸⁵ As a result, recycling is considered to be the least desirable option in the circular economy. The policy of ‘zero waste, one hundred percent value retention’ can benefit from a larger market for second-hand goods. If second-hand goods are sold to a new owner, their value is retained within the economy and their useful life is extended.

Both the CISG and the Consumer Sales Directive 1999 treat second-hand goods in the same way as new goods. Thus, the general rules are applicable to establish the conformity of such goods with the contract and to invoke the remedies by the buyer. Nonetheless, the Directive allows the Member States to provide that, in the case of second-hand goods, the seller and the consumer may agree on a shorter time period for the seller’s liability than the standard legal guarantee period. However, such a period cannot be shorter than one year from the delivery.⁸⁶ The seller should inform the buyer about the legal guarantee period.⁸⁷ The Consumer Sales Directive 2019 has not introduced any changes in this respect.⁸⁸

⁸⁴ The issues of waste and recycling have been addressed by a number of legislative actions within the EU – see e.g. Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, OJ L 312, 22 November 2008, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0098>> (accessed 30 May 2020); European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365, 31 December 1994, available at: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0062>> (accessed 30 May 2020); Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, OJ L 269, 21 October 2000, available at: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0053>> (accessed 30 May 2020); Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ L 182, 16 July 1999, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999L0031>> (accessed 30 May 2020); Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment, OJ L 197, 24 July 2012, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0019>> (accessed 30 May 2020); Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators, OJ L 266, 26 September 2006, available at: <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0066>> (accessed 30 May 2020).

⁸⁵ See e.g. APSRG, *Triple Win, the Social Economic and Environmental Case for Remanufacturing. A Report by the All Party Sustainable Resource Group of the UK Parliament*, 2014, available at: <<https://www.policyconnect.org.uk/apsrg/research/report-triple-win-social-economic-and-environmental-case-remanufacturing>> (accessed 30 May 2020); S. PRAKASH, G. DEHOUST, M. GSELL, T. SCHLEICHER, R. STAMMINGER, *Einfluss der Nutzungsdauer von Produkten auf ihre Umweltwirkung: Schaffung einer Informationsgrundlage und Entwicklung von Strategien gegen “Obsoleszenz”*, UBA Texte, November 2016, available at: <https://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/texte_11_2016_einfluss_der_nutzungsdauer_von_produkten_obsoleszenz.pdf> (accessed 30 May 2020).

⁸⁶ Article 7(1) of the Consumer Sales Directive 1999.

⁸⁷ Article 7(1) and 6(2) of the Consumer Sales Directive 1999.

⁸⁸ Recital 43 and Article 10(6) of the Consumer Sales Directive 2019.

29. One major problem that can be particularly seen in the consumer markets for second-hand goods is the low awareness of the protection offered by the legal guarantee among both retailers and consumers. A research which was conducted in the Nordic countries⁸⁹ indicated that businesses selling second-hand electronics tend to offer a six-month commercial guarantee for such goods. At the same time the research showed that the retailers are unaware of the longer legal guarantee periods. As a result, the retailers do not inform the consumers about their rights arising from the legal guarantee. Because of the low awareness of the buyers concerning the protection offered by the legal guarantee, the buyers do not challenge the shorter liability periods provided in commercial guarantees. The research did not identify a single court case concerning the non-conformity of second-hand goods after the period indicated in a commercial guarantee has expired. One may assume that the consumer confidence in the second-hand goods could substantially increase if the consumers were aware of the level of protection offered by the legislator. Consequently, a better information provided to consumers could strengthen the market of second-hand goods and contribute to the circular economy. What is missing therefore is the legal enforcement of information duties imposed in this respect on the sellers.

5. CONCLUSION

30. The law of sales has an important role to play in the development of the circular economy. If properly designed, sales law can influence the durability and a longer use life of goods. A broader applicability of repair as remedy for non-conformity and a limited availability of replacement and rescission can prolong ‘the replacement cycle’ and reduce the long-term sales volume generated in both consumer and commercial markets. A similar outcome can be achieved by allowing the producers to replace non-conforming goods with refurbished ones. Nevertheless, an account must be taken of the buyer’s performance interest. If this interest cannot be sufficiently protected by resorting to a more sustainable remedy, the buyer should be given an option to elect another remedy which offers an adequate protection. If the buyer’s performance interest can be adequately protected by a remedy that better corresponds to sustainability goals, in civil law jurisdictions, the principle of good faith may require the buyer to elect such a remedy. The legislators may further strengthen the durability and the longer use life of goods by extending the time limits during which the remedies can be claimed and by placing the burden of proof of the time in which the non-conformity has emerged on the seller rather than on the buyer. Finally, special efforts should be made to enhance consumer confidence in second-hand goods. Even though the rules currently in force offer a similar level of protection regardless of whether the purchased goods are new or used, neither consumers nor retailers are aware of this protection. Enforcing information duties imposed on the sellers of second-hand goods could increase the sales of such goods and consequently support the circular economy.

⁸⁹ See D. WATSON, A.CH. GYLLING, N. TOJO, H. THRONE-HOLST, B. BAUER, L. MILIOS in ‘Circular Business Models in the Mobile Phone Industry’, Nordic Council of Ministers, Copenhagen, 2017, p. 61, available at: <<https://norden.diva-portal.org/smash/get/diva2:1153357/FULLTEXT02.pdf>> (accessed 30 May 2020).